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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Modoc)

CALIFORNIA PINES PROPERTY OWNERS ASSOCIATION, Plaintiff and Appellant, v. ROBERT PEDOTTI, Defendant and Respondent.	C066315 (Super. Ct. No. CU08110)

APPEAL from a judgment of the Superior Court of Modoc County, Laura J. Masunaga, Judge. (Judge of Siskiyou Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Minasian, Spruance, Meith, Soares & Sexton, Paul R. Minasian and Dustin C. Cooper for Plaintiff and Appellant.

Law Offices of Gifford & Harr and Tom Gifford for Defendant and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II through V.

California Pines Property Owners Association (the Association) appeals after the trial court resolved a dispute over water diversion rights in favor of defendant Robert Pedotti.

The Association owns land in the community of California Pines in Modoc County, California, including the land where Donovan Reservoir (Reservoir) and its dam are located. Pedotti owns the nearby 1,761-acre Diamond C Ranch (Ranch), where he has raised over 1,000 head of cattle and farmed alfalfa and other natural grasses for livestock.

Pedotti and the Association are assignees of a 1986 50-year water storage agreement (the Agreement) entered into by predecessor owners. Among other things, the Agreement provides: Pedotti has a right to certain water that flows into the Reservoir (Ranch Water)[1] and certain water delivery systems that can divert Ranch Water out of the Reservoir. Pedotti needs the Reservoir to store Ranch Water for Ranch operations. At the same time, the Association needs the Ranch Water to maintain the Reservoir level and the aesthetic value of the waterfront area of the California Pines subdivision. Thus, Pedotti can store Ranch Water in the Reservoir, but he cannot impede the flow of Ranch Water into the Reservoir, and he must use "best efforts" to maintain a full Reservoir, subject to natural circumstances

[1] The source of the Ranch Water is an area known as the Rye Grass Swale.

beyond Pedotti's control. The Agreement does not define "best efforts."

The dispute between the parties involves Pedotti's use of Ranch Water in 2006 through 2008. The trial court ruled in Pedotti's favor on each of the Association's causes of action.

On appeal the Association contends (1) "best efforts" means the efforts required of a fiduciary; (2) in interpreting the Agreement, the trial court should have considered extrinsic evidence of the circumstances surrounding the making and the pre-dispute implementation of the Agreement; (3) substantial evidence does not support certain trial court findings; (4) the trial court erred in requiring the Association to prove breach of contract elements on its cause of action for violation of the licenses; and (5) the trial court erred in concluding that Pedotti's water interest had priority over the Association's interest.

Addressing the Association's first contention in the published portion of this opinion, we conclude that when a contract does not define the phrase "best efforts," the promisor must use the diligence of a reasonable person under comparable circumstances, not the diligence required of a fiduciary.

In the unpublished portion of this opinion, we address the Association's remaining contentions, concluding: the trial court did not err in ruling that the extrinsic evidence proffered by the Association was not relevant; the Association fails to establish that the trial court's findings are not supported by substantial evidence or that any error was

prejudicial; any error in requiring the Association to prove breach of contract elements was harmless because the evidence supports the trial court's finding that Pedotti did not violate the licenses; and on the relevant issue as to whether Pedotti breached the Agreement and violated the licenses, the trial court found that he did not, and the evidence supports the trial court's findings.

We will affirm the judgment.

BACKGROUND

Viewing the evidence in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference and resolving all conflicts in the evidence in support of the judgment (*As You Sow v. Conbraco Industries* (2005) 135 Cal.App.4th 431, 454), we glean the following from the record.

In 1960, the State Water Rights Board, now the State Water Resources Control Board (Board), issued a license for diversion and use of water, license No. 6293. License No. 6293 grants the licensee a right to use Ranch Water from the Rye Grass Swale in an amount not to exceed 565 acre feet per year for the purpose of irrigation. The license designated a specific geographic area (a "place of use" that is now part of the Ranch) where the water could be put to beneficial use.

In 1972, the Board issued a second license for diversion and use of water, license No. 9869, granting the licensee a right to use Ranch Water from the Rye Grass Swale in an amount not to exceed 669 acre feet per year, with a maximum withdrawal of 400 acre feet in any one year, for purposes of irrigation,

stockwatering, and recreational uses. Stockwatering is using water for commercial livestock. (Cal. Code Regs., tit. 23, § 669.) Once again, the license designated a specific place of use (now another part of the Ranch that is contiguous with the place of use for license No. 6293) where the water could be put to beneficial use.

To cooperate in the use of the licenses, the Agreement was originally entered into between Leisure Industries, Inc. (Leisure), the predecessor owner of the Reservoir land, and Judith Carlsberg and the estate of Arthur Carlsberg, the former Ranch owners. The Agreement specified that Leisure would allow the Ranch to continue to store Ranch Water in the Reservoir, and the Ranch would not "impede the flow of Ranch Water" into the Reservoir and would "use its best efforts to maintain the water level" of the Reservoir to an elevation of at least 4,353 feet above sea level (the level at which the Reservoir is considered full), "subject to natural disasters, Acts of God, and other physical forces" beyond the control of the Ranch.

In 1992 Leisure assigned its interests in the Agreement to the Association, and in 1993 Pedotti purchased the Ranch and acquired interests in the Agreement and the licenses from the Carlsberg family.

Pedotti has been irrigating with Ranch Water since he purchased the Ranch. Water collected under each license was "commingled" in the Reservoir and flowed out of the Reservoir through the same outlet. Although Pedotti could estimate how much Ranch Water went to each license's place of use, he could

not distinguish the water collected under each license when the water was drawn from the Reservoir.

Pedotti used a flood irrigation system (open earthen ditches) to move Ranch Water to irrigate his pastures and fields. To divert water from the Reservoir to the Ranch, Pedotti opened a sliding gate which allowed Ranch Water to flow through a conduit from the Reservoir to a distribution box. From the distribution box, Ranch Water flowed through valves; one valve carried water north and the second valve carried water west. Ranch Water travelled from the valves to the various pastures and fields on the Ranch through six to eight miles of ditches. Because he had a gravity-feed system, Pedotti could not use Ranch Water outside the designated places of use in 2006 through 2008.

Flood irrigation was typical for ranches in Modoc County with "low input sustainable livestock operations," and it was an adequate and appropriate irrigation system for the Ranch. Most flood irrigated pasture systems in Modoc County used earthen ditches to deliver water to the fields.

Pedotti's expert witness was Dr. Donald Lancaster, who had been the farm advisor and county director for the University of California Cooperative Extension Service in Modoc County for 32 years. As farm advisor, Dr. Lancaster worked with farmers and ranchers on crop and pasture irrigation and management. He published a book on irrigated pasture management in northeastern California, and he also conducted research and published on the subject of irrigation systems. In addition, he worked with the

manager of the Ranch in the 1980's before Pedotti purchased it. Dr. Lancaster was familiar with the Reservoir, observed Pedotti irrigate the Ranch with Ranch Water, and worked with Pedotti on his irrigation and ranch management practices.

The Association's expert witness was Mr. Edward Schmit, a civil engineer who never worked on a flood irrigation or stockwatering system for a ranch in northeastern California. (RT 142, 150) He worked with landowners in northeastern California only once, on a wetlands restoration project near the city of Adin in 1996 and 1997. Although he admitted it would be important for him to see how Pedotti irrigated his fields, Mr. Schmit did not visit the Ranch or observe Pedotti irrigate. Mr. Schmit saw Pedotti's property over a fence and from an airplane in 2009 at a time when Pedotti did not use any Ranch Water.[2]

According to Dr. Lancaster, an enclosed pipe would be the most efficient water delivery system, but such a system was not practical for many flood-irrigated systems. Dr. Lancaster opined that given the system in place at the Ranch and the scope of Pedotti's livestock production, it would not be economically feasible for Pedotti to replace his flood irrigation system with

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[2] The trial court gave more weight to Dr. Lancaster's expert opinion than the opinion of Mr. Schmit. Because the trier of fact determines the weight to be given expert testimony (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1338; *Jonte v. Key System* (1949) 89 Cal.App.2d 654, 661), we do not reweigh expert opinions on appeal. (*Glover v. Board of Retirement, supra,* at p. 1338.)

a wheel line or center pivot sprinkler system. It would cost over $200,000 to install a wheel line to irrigate 500 acres. In addition, because of the sediment in the reservoir water, Pedotti would have to filter the water to prevent the nozzles in the sprinklers from clogging up. A pivot system for 500 acres would cost at least $500,000. Such a system would require installing a pump, main line and towers and converting overhead power lines to underground systems. A sprinkler irrigation system was also inappropriate for the Ranch because it requires a reliable source of water and there was insufficient Ranch Water available for such a system.

Pedotti typically began irrigating from the Reservoir on April 1. When he irrigated, he checked the irrigation on a daily basis, sometimes for multiple days. He irrigated if it appeared to him, based on his examination of the soil at the root zone, that further irrigation was needed.

Pedotti irrigated during the winter to ensure that there was water available in the soil in the spring. This practice was common and appropriate because of the unpredictability of winter precipitation and as a hedge against drought conditions.

Pedotti maintained his irrigation ditches in 2006 through 2008 by using fall grazing or burning. Allowing cattle to graze in irrigation ditches helped to reduce the amount of vegetation in the water channel so that water could flow more efficiently through the ditches. This was standard practice in Modoc County.

Although it was not best practice to irrigate when cattle are in the field, this was also a common practice in Modoc County. It was not Pedotti's custom and practice to do so, but on occasion he irrigated from the Reservoir while cattle grazed in the lands being irrigated.

Mr. Schmit opined that having livestock in a field during irrigation was not an acceptable practice, because the livestock will compact the soil and make the surface of the field uneven. This causes "ponding" and makes irrigation in the field less efficient in the future. However, the fields at the Ranch were established and well-sodded and there was no compaction problem in Pedotti's fields. Compaction of the soil was not a serious problem in Modoc County because the freezing and thawing of the soil in the winter mitigated any compaction of the soil that may have occurred in the summer.

Additionally, Pedotti's fields did not require re-leveling for the flood irrigation system he used. The field adjacent to the Cal Pines Community Services District sewer ponds, which Mr. Schmit saw in 2009 and opined needed to be re-leveled, did not require leveling because it had never been irrigated.

The Association did not have a way to measure the volume of water in the Reservoir, but Pedotti used two methods to measure the volume of Ranch Water he used. He measured the Reservoir's surface elevation level before and after irrigation, and he used various weirs throughout his irrigation system. Pedotti subtracted the amount of water lost through evaporation

(typically about 36 inches or 40 percent per season) from the total water loss to arrive at the volume of Ranch Water used.

Surface elevation measurement was an accepted and commonly used method for measuring water usage. Mr. Schmit criticized the use of surface elevation measurement because it failed to account for inflow to the Reservoir, but he admitted he did not know whether there was inflow to the Reservoir in 2006 through 2008.

Water can also be effectively measured using a V notch weir. A weir can be used at any point in the delivery system. Dr. Lancaster did not recommend the use of a water meter because of the amount of sediment and vegetation in the Reservoir. Very few water meters were used in Modoc County, and meters were used on pump systems, not on surface-delivered irrigation systems.

In 2006 through 2008, Pedotti took less Ranch Water than he was permitted to take under either license. Although the licenses permitted Pedotti to irrigate a total of 512.6 acres on the Ranch, the Reservoir did not hold sufficient water, even when full, to irrigate 500 acres of alfalfa fields and native pastures. Additionally, the water supply from Rye Grass Swale was inconsistent. Pedotti recalled that the Reservoir was full only four times in 16 years. The Association's administrator, Henry Drury, recalled only two years when the Reservoir was full: 1999 and 2006. Consequently, pursuant to a verbal agreement with a neighboring property owner, Pedotti used Canyon Creek to irrigate some of the 512.6 acres of land he was permitted to irrigate under the licenses. Pedotti did not take

any water from the Reservoir in 2009 because there was insufficient water in the Reservoir.

Dr. Lancaster opined that Pedotti applied his knowledge and experience to "the management system" and used his maximum efforts to irrigate the Ranch with Ranch Water as beneficially and efficiently as possible. According to Dr. Lancaster, Pedotti was "in the upper echelon of the producers with systems similar to his." Dr. Lancaster testified that Pedotti was "an efficient" and "proficient" irrigator and was very aware of the Ranch's water needs, his water delivery system, and its ability to deliver water to his pastures and fields. Pedotti testified that he irrigated using Ranch Water "[t]o the utmost of" his ability.

As permitted under license No. 9869, Pedotti also took water from the Reservoir for stockwatering purposes. Pedotti stockwatered throughout the year by moving water from the Reservoir to earthen ditches. Mr. Schmit opined that using watering troughs or a pond for stockwatering would be "more efficient in terms of water usage." But according to Pedotti, troughs would not be practical in the fields where he irrigated.

The Association filed a complaint against Pedotti asserting causes of action for (1) breach of contract, (2) violation of reasonable and beneficial use of water, and (3) injunctive relief. The complaint alleged that Pedotti breached the Agreement by failing to use his best efforts to maintain the water level of the Reservoir, taking more water than reasonably permitted under the Agreement, and failing to apply Ranch Water

to beneficial use in 2006, 2007 and 2008. The complaint further alleged that Pedotti violated the terms of the licenses by using unreasonable quantities of Ranch Water, applying Ranch Water to lands not specified in the licenses, applying Ranch Water for purposes not listed as a permitted beneficial use under the licenses, and failing to take appropriate measures to conserve water. The Association sought specific performance of the Agreement, the appointment of a water master to regulate the amount of Ranch Water used by the Association and Pedotti, and an order limiting Pedotti's use of the Ranch Water.

Following a court trial, the trial court ruled in favor of Pedotti on each cause of action.

STANDARD OF REVIEW

A judgment of the trial court is presumed to be correct, and all intendments and presumptions are indulged to support it on matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) It is the appellant's burden to affirmatively demonstrate reversible error. (*In re Marriage of Gray* (2002) 103 Cal.App.4th 974, 978.)

DISCUSSION

I

The Association contends the trial court erred by equating best efforts with the implied covenant of good faith and fair dealing and finding that Pedotti satisfied his contractual duty to use best efforts by exercising "good" or "typical" efforts. In the Association's view, the duty to use best efforts is akin to the duty owed by a fiduciary and requires more than usual or

reasonably diligent efforts. The Association claims the best efforts provision in the Agreement required Pedotti to place the Association's interest (having a full or mostly full Reservoir) above Pedotti's interest (using Ranch Water for the Ranch). We disagree.

Courts have held that a best efforts clause, without more, does not create a fiduciary relationship. (*Olympia Hotels Corp. v. Johnson Wax Dev. Corp.* (7th Cir. 1990) 908 F.2d 1363, 1374; *O'Hearn v. Bodyonics, Ltd.* (E.D.N.Y. 1998) 22 F.Supp.2d 7, 12 ["Under New York law, an arms-length commercial transaction generally does not give rise to a fiduciary relationship, even if the defendants have relied on the plaintiffs' contractual obligation to use their 'best efforts'"]; *Ekern v. Sew/Fit Co., Inc.* (N.D.Ill. 1985) 622 F.Supp. 367, 372-373 [finding no fiduciary relationship between the parties even where they had a best efforts contract]; see 2 Farnsworth on Contracts (3d ed. 2004) § 7.17c, p. 405 [best efforts "presumably falls short of the standard required of a fiduciary, who is required 'to act primarily for the benefit of another in matters connected with his undertaking'"].)

California courts have enforced best efforts contracts but have not defined the term "best efforts." (*Gilmore v. Hoffman* (1954) 123 Cal.App.2d 313, 319-320 (*Gilmore*); *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 274 (*Midland Pacific*).) Instead, best efforts are construed in the context of the circumstances in a particular case. (*Gilmore, supra,* at p. 320 [whether the defendant exercised best efforts under the

circumstances was a factual question to be decided by the trier of fact]; accord, *Triple-A Baseball Club v. Northeastern Baseball* (1st Cir. 1987) 832 F.2d 214, 225 [best efforts "cannot be defined in terms of a fixed formula . . . [but] varies with the facts and the field of law involved"]; *Bloor v. Falstaff Brewing Corp.* (S.D.N.Y. 1978) 454 F.Supp. 258, 266, affd. (2d Cir. 1979) 601 F.2d 609.) Additionally, a best efforts clause must be reconciled with other clauses in the contract to the extent possible. (Civ. Code, § 1641; accord, *Vestron, Inc. v. National Geographic Soc.* (S.D.N.Y. 1990) 750 F.Supp. 586, 593.)

Gilmore, supra, 123 Cal.App.2d 313 illustrates the fact-intensive inquiry required in determining whether best efforts were exercised. The issue in *Gilmore* was whether defendants fulfilled their best efforts obligation to supply water to plaintiff's farm. (*Gilmore, supra,* 123 Cal.App.2d at p. 319.) The parties' lease agreement required defendants to provide plaintiff with sufficient water for irrigation. (*Id.* at pp. 314-315.) Defendants agreed that in the event the supply of water materially decreased or the pumping plant on the leased property failed, defendants would deepen the well, lower the pump or "do such other things as may be necessary to increase the supply of water that can be produced by the said well and pumping plant to an amount as nearly equal to that now being produced as is reasonably possible." (*Id.* at p. 315.) The lease agreement stated, "nothing herein contained to be construed as making the lessors guarantors of water at all

times, but only to use their best efforts to see that there is sufficient water to irrigate said property." (*Ibid.*)

When one of the pumping plants furnishing water to the leased property failed, defendants made some effort to repair the pump on three occasions. (*Gilmore, supra,* 123 Cal.App.2d at pp. 317-318.) However, plaintiff was unable to irrigate his crop for about one and a half months. (*Id.* at p. 315.) After three attempts to repair the pump, defendants drilled a new well. (*Id.* at p. 318.) In the meantime, plaintiff's crop did not survive. (*Ibid.*)

The trial court found that defendants' failure to "do such other things as might be necessary" to supply water to plaintiff showed a lack of diligence resulting in plaintiff's damages. (*Gilmore, supra,* 123 Cal.App.2d at p. 316.) The appellate court affirmed the trial court's judgment. (*Id.* at p. 324.) On appeal, the defendants in that case argued that they exercised reasonable diligence in repairing the pump and if best efforts required them to drill a new well, they did so diligently. (*Id.* at pp. 316-317.) Plaintiff responded that defendants failed to exercise ordinary diligence in ensuring that there was sufficient water to irrigate the leased property. (*Id.* at p. 317.) The appellate court held that defendants could not satisfy their obligation to use their best efforts to see that there was sufficient water to irrigate the leased property by making only two or three unsuccessful attempts to repair the pump. (*Id.* at p. 319.) Based on the trial court's factual findings, the appellate court concluded that best efforts

required defendants to drill a new well when they were notified that the pump had stopped working. (*Ibid.*) The appellate court did not define "best efforts." Rather, it stated, "[w]hether defendants took the proper course, obtained proper counsel and advice, and acted wisely and timely and used their best efforts under the circumstances to correct the condition was a factual question for the trial court to determine. Its finding on this question, under the evidence, cannot be disturbed on appeal." (*Id.* at p. 320.)

Courts from other jurisdictions have held that when a contract does not define the phrase "best efforts," the promisor must use the diligence of a reasonable person under comparable circumstances. (*Coady Corp. v. Toyota Motor Distributors, Inc.* (1st Cir. 2004) 361 F.3d 50, 59 ["'Best efforts' is implicitly qualified by a reasonableness test -- it cannot mean everything possible under the sun"]; *Hoffman v. L & M Arts* (N.D.Tex. 2011) 774 F.Supp.2d 826, 834 [best efforts holds defendants to an objective standard based on norms of reasonableness in the industry]; *Bloor v. Falstaff Brewing Corp.*, *supra*, 454 F.Supp. at pp. 267, 269, 271-272 [finding that promisor breached its best efforts contract by failing to act in the manner required for an "average, prudent, comparable brewer" situated as promisor]; *Arnold Productions, Inc. v. Favorite Films Corporation* (S.D.N.Y. 1959) 176 F.Supp. 862, 866-867, affd. (2d Cir. 1962) 298 F.2d 540 ["In ascertaining best efforts we would have to compare defendant's performance with the average, prudent comparable distributor in the T.V. market. A comparison

of defendant's performance with that of the comparatively small scale operations of plaintiff's expert would not be valid"]; *CKB & Assoc., Inc. v. Moore McCormack Petroleum, Inc.* (Tex.App. 1991) 809 S.W.2d 577, 582 [when a party misses the goals or guidelines set forth in a best efforts contract, courts measure the quality of its efforts by the circumstances of the case and by comparing the party's performance with that of an average, prudent, comparable operator].) We agree with these authorities.

Best efforts does not mean every conceivable effort. (*Triple-A Baseball Club v. Northeastern Baseball, supra,* 832 F.2d at p. 228.) It does not require the promisor to ignore its own interests, spend itself into bankruptcy, or incur substantial losses to perform its contractual obligations. (*Bloor v. Falstaff Brewing Corp., supra,* 601 F.2d at pp. 613-614.) Rather, it "'requires a party to make such efforts as are reasonable in . . . light of that party's ability and the means at its disposal and of the other party's justifiable expectations. . . .'" (*Bloor v. Falstaff Brewing Corp., supra,* 454 F.Supp. at p. 267; *Samica Enterprises v. Mail Boxes Etc. USA, Inc.* (C.D.Cal. 2008) 637 F.Supp.2d 712, 717.)

Thus, while we agree with the Association that a promise to use "best" efforts is different than a promise to act in "good faith" (2 Farnsworth on Contracts, *supra*, § 7.17c at page 405),[3]

[3] Farnsworth distinguishes the standard of best efforts from that of good faith: "Good faith is a standard that has honesty

we do not agree that a promise to use best efforts creates an obligation equivalent to a fiduciary duty. Instead, we agree with the courts from other jurisdictions that when a contract does not define the phrase "best efforts," the promisor must use the diligence of a reasonable person under comparable circumstances. Diligence is certainly required, but the obligation is framed within the bounds of reasonableness.

In this case, the trial court stated that the best efforts clause did not create a fiduciary relationship and had to be examined in the context of the Agreement and what constituted best practices for a rancher in Modoc County using his water rights licenses for the stated purposes. The trial court did not apply an erroneous standard.

Nonetheless, the Association asserts that the courts in *Brogdex Co. v. Walcott* (1954) 123 Cal.App.2d 575 (*Brogdex*), *Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell* (1999) 76 Cal.App.4th 227 (*Larkin*), *Credit Bureau Metro, Inc. v. Mims* (1975) 45 Cal.App.3d Supp. 12 (*Mims)*, *In re Marriage of Hublou* (1991) 231 Cal.App.3d 956, *Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274 (*Bowman*), *Cooper v. American Fruit Growers, Inc.* (1934) 137 Cal.App. 494 (*Cooper*), and *Midland Pacific, supra,* 157 Cal.App.4th 264 enforced best efforts

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and fairness at its core and that is imposed on every party to a contract. Best efforts is a standard that has diligence as its essence and is imposed on those contracting parties that have undertaken such performance. The two standards are distinct and . . . best efforts is the more exacting . . . ." (2 Farnsworth on Contracts, *supra*, § 7.17c, p. 405, fn. omitted.)

contracts and concluded that best efforts required more than reasonably diligent efforts. We disagree.

Brogdex did not involve a breach of contract claim. (*Brogdex, supra,* 123 Cal.App.2d at p. 576.) Instead, the appellate court in *Brogdex* found that defendants breached the implied obligation to deal fairly and in good faith. (*Id.* at p. 581.) The court did not find a breach of the best efforts clause in the parties' agreement.

The meaning of the best efforts provision in *Bowman* was not an issue presented to the appellate court or discussed by it. (*Bowman, supra,* 227 Cal.App.2d at pp. 277-278.) *Larkin* involved a petition to compel arbitration. The appellate court did not discuss the merits of plaintiff's breach of contract claim. (*Larkin, supra*, 76 Cal.App.4th at pp. 229-230.) *Mims* did not involve a best efforts contract. The issue in *Mims* was whether plaintiff complied with the requirement to act "in good faith and in a commercially reasonable manner" pursuant to former California Uniform Commercial Code section 9504. (*Mims, supra,* 45 Cal.App.3d Supp. at pp. 14-15.)

In re Marriage of Hublou involved a trial court finding that the respondent did not use her best efforts to obtain employment as contemplated by a dissolution judgment. (*In re Marriage of Hublou, supra,* 231 Cal.App.3d at p. 960.) The sole issue on appeal was whether the trial court abused its discretion in awarding attorney's fees and costs to respondent. (*In re Marriage of Hublou, supra,* 231 Cal.App.3d at p. 958.) The appellate court did not construe the best efforts provision

in the dissolution judgment or determine whether respondent had complied with the requirement in the judgment to use best efforts.

The promisor in *Cooper* neglected to take any action to perform its contractual obligation. (*Cooper, supra,* 137 Cal.App. at p. 495.) This court did not discuss the quality of the promisor's performance (good, typical, reasonably diligent, or otherwise) because the promisor simply did not undertake any effort to perform. And the court in *Midland Pacific, supra,* 157 Cal.App.4th 264 did not state that best efforts required more than reasonably diligent efforts. (*Midland Pacific, supra,* 157 Cal.App.4th at pp. 274-275.)

Accordingly, the Association's contention lacks merit.

II*

The Association next argues the trial court erred in disregarding the testimony of Paul Ostoja and Randolph Faver pertaining to the circumstances surrounding the execution and the pre-dispute implementation of the Agreement.

The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time of contracting. (Civ. Code, § 1636; *Capitol Steel Fabricators, Inc. v. Mega Construction Co.* (1997) 58 Cal.App.4th 1049, 1056.) But courts must look first to the contract language itself. (Civ. Code, §§ 1638, 1639; *County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 415.) "Extrinsic evidence is admissible to explain the meaning of a contract only where it is relevant to prove a meaning to which

the language of the instrument is reasonably susceptible." (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 560.) If the contract language is unclear, the court may consider evidence of the parties' discussions when the contract was negotiated and the surrounding circumstances so that the court can "'"place itself in the same situation in which the parties found themselves at the time of contracting."'" (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165, 1167-1168.) However, such an exercise is limited to determining the actual intent of the parties to the contract. (Civ. Code, § 1647 ["A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates"]; Code Civ. Proc., § 1860 ["For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret"].)

Ostoja described two metal stakes that had been driven into the face of the dam to mark high and low water levels for the Reservoir. He testified that, during an unspecified period of time when the Carlsbergs owned the Reservoir and "Carlsb[e]rg's father-in-law" owned the Ranch, the father-in-law would stop taking water from the Reservoir when the reservoir water level fell below the low water mark. Ostoja claimed that this practice was in place as long as Carlsberg's father-in-law owned the Ranch.

Even if Ostoja's reference to Carlsberg's father-in-law was to Arthur Carlsberg, there is no evidence that Judith Carlsberg had the so-called two stakes understanding in mind in 1986 when she executed the Agreement for herself and as executor of the estate of Arthur Carlsberg. The Agreement does not mention a two stakes understanding and there is no evidence that Ostoja had personal knowledge of the circumstances which attended the making of the Agreement. (Evid. Code, § 702.) Ostoja did not work at California Pines in 1986 and he was not familiar with the Agreement. The trial court did not err in rejecting Ostoja's testimony based on lack of personal knowledge.

We also reject the Association's contention that Faver's testimony is competent evidence concerning the meaning of the best efforts provision in the Agreement. Faver testified that in the 1980's he was able to boat right up to his lakeside property at the California Pines subdivision, but that in 1995 the Association disallowed boats on the Reservoir because of the low Reservoir level. However, Faver did not testify about the reason for the low Reservoir level in 1995 or the water level required for boating. And there is no evidence Faver had personal knowledge of the Agreement or the circumstances surrounding its execution.

Although the intent of the contracting parties may be determined from their conduct after the execution of the contract and before any controversy has arisen (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 752-756; *Hernandez v. Badger Construction Equipment Co.* (1994) 28

Cal.App.4th 1791, 1814), there is no evidence that in the 1980's the Ranch deliberately maintained the Reservoir at a level that would permit boating on the Reservoir because of an obligation under the Agreement. There is also no evidence that, between execution of the Agreement and initiation of the lawsuit, the Association ever complained to Pedotti that allowing the Reservoir to fall below the water level for boating violated Pedotti's best efforts obligation. The complaints brought by the Association before it filed the instant lawsuit did not mention boating.

The trial court did not abuse its discretion in concluding that Faver's testimony was not relevant to the meaning of the term "best efforts."

III*

The Association also argues that various factual findings made by the trial court are not supported by substantial evidence.

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . . If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.) Substantial

evidence is evidence "'of ponderable legal significance, . . . reasonable in nature, credible, and of solid value.'" (*Id.* at p. 873, italics omitted.)

We address each challenged finding in turn.

A

The Association contends substantial evidence does not support the trial court's finding that Ronald Sherer recalled only one occasion when Ranch Water overflowed the Ranch's ditches, because Sherer testified that he saw water overflow the banks of the Ranch's ditches in 2007 and 2008.[4] We agree that the trial court's finding is contrary to Sherer's testimony. Nonetheless, the Association does not argue or demonstrate prejudice, and this is fatal to its contention. (Code Civ. Proc., § 475; *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337 [burden is on appellant to show that an error created a miscarriage of justice]; *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963 [the court will not furnish a legal argument regarding prejudice].)

B

The Association next claims the testimony by Sherer and Drury undermines the trial court's finding that there was no

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[4] In addition, the Association contends Henry Drury testified that he observed water overflowing the ditches in 2006 and 2008. But the Association failed to cite the portion of the record supporting its assertion concerning Drury's testimony. This claim is thus forfeited. (Cal. Rules of Court, rule 8.204(a); *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239-1240.)

evidence of vegetation in Pedotti's ditches at any time when Pedotti was irrigating. But the assertion regarding Sherer's testimony is forfeited for failure to provide a citation to the record. (*City of Lincoln v. Barringer, supra,* 102 Cal.App.4th at pp. 1239-1240.) And the portion of Drury's testimony cited by the Association references weeds "over" the ditches, and does not clearly indicate vegetation or weeds blocking the water channel. Pedotti testified he maintained his ditches in 2006, 2007 and 2008. The credibility of witnesses and the weight to be given their testimony are matters within the sole province of the trier of fact; we do not reweigh the evidence, but instead view the evidence in the light most favorable to the judgment. (*As You Sow v. Conbraco Industries, supra*, 135 Cal.App.4th at p. 454.) The Association has not established the asserted error.

C

Next, the Association contends the trial court erred by finding there was insufficient evidence that Pedotti stockwatered beyond the areas authorized by the license.

It was license No. 9869 that permitted stockwatering of livestock; license No. 6293 only permitted irrigation. Pedotti testified:

"Q. You provide stock water to cattle while on both places of use under both licenses; isn't that right?

"A. The places of use aren't separated by a fence, the cattle roam.

"Q. Sir, I'm only asking you a yes or no.

"A. I can't answer that a yes or no without an explanation.

"Q. Let me ask it again. You provide stock water to cattle while on both licenses' place of uses; isn't that correct?

"A. That's correct."

The trial court deduced from Pedotti's testimony that because cattle can freely roam Pedotti's property, water was generally available to cattle even though license No. 9869 authorized stockwatering on a specific portion of the Ranch. The trial court noted that cattle were observed drinking water from irrigation ditches. However, there was no testimony that cattle were observed drinking water on the 122.3 acres covered by license No. 6293. Drury saw cows drinking in Pedotti's northeastern field in October 2008, but he did not say the area was part of a place of use for a particular license. Accordingly, the trial court concluded there was insufficient evidence that Pedotti stockwatered in unauthorized areas.

The Association contends the trial court was wrong because in Pedotti's triennial report to the Board for 2006, 2007 and 2008, he reported the same information about stockwatering for each license. But Pedotti explained, without contradiction, that the duplicate reporting was a mistake because he did not realize he had to report separately for each license. The trial court credited Pedotti's explanation and thereby rejected any claim that the reports constituted an admission that Pedotti stockwatered on license No. 6293's place of use. Again, we do

not reweigh the evidence, but instead view the evidence in the light most favorable to the judgment. (*As You Sow v. Conbraco Industries, supra*, 135 Cal.App.4th at p. 454.)

The Association nonetheless asserts that by "reconfiguring" the field size and location, Pedotti made it impossible to ensure that water collected under license No. 9869 was applied to the place of use for that license. This contention, however, is not supported by citation to the record and is forfeited. (Cal. Rules of Court, rule 8.204(a); *City of Lincoln v. Barringer, supra,* 102 Cal.App.4th at pp. 1239-1240.)

The Association also contends the trial court was wrong because license No. 9869 only authorizes stockwatering at the Reservoir. Nevertheless, the trial court properly declined to consider the contention that Pedotti could only stockwater at the Reservoir, because the Association never raised the contention in its verified complaint, trial brief, opening argument at trial or opening post-trial brief. The contention was asserted for the first time in the Association's closing post-trial brief. The Association could not raise a new theory after the close of trial. (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 858 [due process precludes consideration of evidence for an issue the parties did not raise in their pleadings and that was not before the court at trial]; *Stone v. Lobsien* (1952) 112 Cal.App.2d 750, 758 [trial court has the discretion to refuse to consider a defense raised for the first time in a closing brief].)

D

In addition, the Association contends substantial evidence does not support the trial court's findings that water troughs were not practical to use in Pedotti's fields and it was a significant expense to pipe water to troughs over a 1,761-acre ranch. The Association claims the trial court's reference to a 1,761-acre ranch was misleading because the Association argued that troughs should be used only in certain places of use.

Mr. Schmit recommended piping water to troughs, but Pedotti did not have troughs in the places of use. The trial court credited Pedotti's testimony that troughs would not be practical to use in the fields where he irrigated. Pedotti would have to install pipes to implement Schmit's recommendation. Dr. Lancaster opined that it would not be economically feasible for Pedotti to install a pipe system. Dr. Lancaster described the substantial cost and additional requirements for installing a pipe system. The testimony of Pedotti and Dr. Lancaster support the trial court's findings regarding installing pipes to carry water to troughs in Pedotti's fields.

Even if the trial court's reference to the 1,761-acre ranch was overbroad, the trial court also referenced, in a preceding paragraph, the cost of installing a pipe irrigation system for a 500-acre ranch. This shows that the trial court understood the size of the places of use. Moreover, the Association argues that the trial court's statement was misleading but does not demonstrate how the reference was prejudicial given the totality of the trial court's decision. The Association failed to meet

its burden. (*Century Surety Co. v. Polisso, supra,* 139 Cal.App.4th at p. 963.)

E

The Association also challenges the trial court's finding that there was no evidence of misuse or waste of water during the few occasions when Pedotti may have had cattle in his fields during irrigation.

Mr. Schmit opined that it was not an acceptable practice to have livestock in a field during irrigation because the livestock will compact the soil and make the surface of the field uneven. Nonetheless, the testimony of Dr. Lancaster and Pedotti support the trial court's finding that occasional irrigation with cattle in the fields did not cause soil compaction or unlevel fields resulting in inefficient water use. Dr. Lancaster testified that there was no compaction problem in Pedotti's fields and Pedotti's lands did not require leveling. Pedotti testified it was not his custom to have cattle grazing during irrigation.

Accordingly, the Association failed in its burden to establish that the trial court's findings are not supported by substantial evidence or that any error was prejudicial.

IV*

Regarding the Association's second cause of action asserting violation of the licenses, the trial court ruled that to succeed on that cause of action, the Association had to prove the elements of a breach of contract claim: contract, performance, breach and damages. The Association contends on

appeal that the trial court was wrong and that Water Code section 1851 establishes a private right of enforcement of the licenses. The Association surmises that this legal error caused the trial court to ignore evidence that Pedotti violated the licenses.

Although the Association cites "common sense" in support of its position, it does not cite legal authority identifying the elements of a cause of action for violation of a water right license, and it does not articulate what the legal elements should be. In any event, any legal error was not prejudicial because the evidence supports the trial court's finding that Pedotti did not violate the licenses.

What constitutes a reasonable and beneficial use of water depends upon the facts and circumstances of each case. (*Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 567 (*Lindsay-Strathmore Dist.*).) Conformity of a use, method of use, or method of diversion of water with local custom is one factor to be weighed in determining the reasonableness of the use, method of use, or method of diversion of water. (Water Code, § 100.5.) "[A]n appropriator cannot be compelled to divert according to the most scientific method known. He is entitled to make a reasonable use of the water according to the general custom of the locality, so long as the custom does not involve unnecessary waste." (*Lindsay-Strathmore Dist.*, *supra*, at pp. 547 & 572-573.)

Here, Dr. Lancaster opined that the irrigation system Pedotti used was appropriate for Modoc County and for Pedotti's

property and ranch operation. Dr. Lancaster opined that Pedotti was a proficient irrigator and used his maximum efforts to irrigate his lands with Ranch Water as beneficially and efficiently as possible. Pedotti testified that he did not waste water when irrigating. He checked his irrigation on a daily basis when he was irrigating. His fields were adequately level; his ditches were appropriately maintained; his fields did not exhibit a compaction problem; and he used an effective method to measure the volume of water used. It was not Pedotti's custom to allow cattle to graze when he irrigated out of the Reservoir. Because he had a "gravity feed system" Pedotti could not use the Ranch Water outside the designated places of use in 2006 through 2008. Moreover, during that time period Pedotti did not use more Ranch Water than was permitted by the licenses. There is no evidence that Pedotti used Ranch Water for a purpose other than irrigation or stockwatering.

Based on this record, the Association has not met its burden to establish that reversal is required.

V*

The Association argues the trial court also erred in concluding that Pedotti's interest in using Ranch Water had priority over the Association's interest in maintaining the Reservoir level for aesthetic and recreational purposes.

The trial court noted in its decision that there was handwriting on the licenses indicating the licenses had been assigned to Pedotti and the Association. But the trial court said there were no allegations in the Association's complaint

that the Association was a co-owner of the licenses and there was no evidence other than the handwriting itself that the Association was a co-owner. Accordingly, the trial court ruled that Pedotti had "primary" rights under the licenses.

The Association argues there is no legal basis to distinguish between "primary" and "non-primary" rights in this context, and in any event, the Agreement should control. We agree that the relevant issue is whether Pedotti breached the Agreement and violated the licenses. On that issue, the trial court found that Pedotti did not breach the Agreement or violate the licenses, and the evidence supports the trial court's findings.

In its reply brief, the Association argues the trial court erred by engaging in a "collateral investigation of matters" when it asked the parties to explain the handwritten notes on the licenses after the trial ended. We decline to address this argument because it was raised for the first time in the reply brief. (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1074.)

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

HULL, Acting P. J.

ROBIE, J.